

Thomas Jefferson to George Washington, July 29, 1790, Memorandum on Indian Trade, from the Works of Thomas Jefferson in Twelve Volumes. Federal Edition. Collected and Edited by Paul Leicester Ford.

OPINION ON INDIAN TRADE

[July 29th, 1790.]

Opinion in regard to the continuance of the monopoly of the commerce of the Creek nation, enjoyed by Col. McGillivray:

Colonel McGillivray, with a company of British merchants, having hitherto enjoyed a monopoly of the commerce of the Creek nation, with a right of importing their goods duty free, and considering these privileges as the principal sources of his power over that nation, is unwilling to enter into treaty with us, unless they can be continued to him. And the question is how this may be done consistently with our laws, and so as to avoid just complaints from those of our citizens who would wish to participate of the trade?

Our citizens, at this time, are not permitted to trade in that nation. The nation has a right to give us their peace, and to withhold their commerce, to place it under whatever monopolies or regulations they please. If they insist that only Colonel McGillivray and his company shall be permitted to trade among them, we have no right to say the contrary. We shall even gain some advantage in substituting citizens of the United States instead of British subjects, as associates of Colonel McGillivray, and excluding both British and Spaniards from the country.

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Suppose, then, it be expressly stipulated by treaty, that no person be permitted to trade in the Creek country, without a license from the President, that but a fixed number shall be permitted to trade there at all, and that the goods imported for and sent to the Creek nation, shall be duty free. It may further be either expressed that the person licensed shall be approved by the leader or leaders of the nation, or without this, it may be understood between the Pre-

-sident and McGillivray that the stipulated number of licenses shall be sent to him blank, to fill up. A treaty made by the President, with the concurrence of two-thirds of the Senate is a law of the land, and a law of superior order, because it not only repeals past laws, but cannot itself be repealed by future ones.¹ The treaty, then, will legally control the duty acts, and the acts for licensing traders, in this particular instance. When a citizen applies for a license, who is not of McGillivray's partnership, he will be told that but a given number could be licensed by the treaty, and that the number is full. It seems that in this way no law will be violated, and no just cause of complaint will be given; on the contrary, the treaty will have bettered our situation though not in the full degree which might have been wished.

¹ At a later period, upon reviewing this opinion, the following note was appended by Jefferson: "Unless with the consent or default of the other contracting party. It may well be doubted, too, and perhaps denied that the treaty power can control a law. The question here proposed was then of the first impression. Subsequent investigations have proved that the contrary position is the more general truth."